

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Clarification of the Territorial Exclusivity Limits of)	MB Docket No. 04-75
Section 73.658(b) of the Commission's Rules as Applied to the)	
Restrictions on Access to NBC Network Programming in the)	
Great Falls, Montana Community in a Certain Arrangement)	
Involving Television Broadcast Stations KBAO, Lewiston, MT <i>et al.</i>)	

**CONSOLIDATED OPPOSITION TO MOTION TO ACCEPT COMMENTS AND
TO COMMENTS OF DESTINY LICENSES, LLC IN SUPPORT OF PETITION FOR EXPEDITED
DECLARATORY RULING**

On March 21, 2005, more than one year after the Commission had first sought public comment as to this first, Destiny Licenses, LLC ("Destiny"), seeks to make itself a party to a proceeding. Both Destiny's submission and the matter in its entirety should be dismissed. ¹

As a threshold matter, Destiny has not established that it merits status as a party-in-interest in this proceeding. Destiny's brief submission alleges that it is now a party-in-interest by virtue of the assignment of the license of Television Broadcast Station KTGF, Great Falls, Montana (the "Station") to Destiny from Max Media of Montana LLC ("Max Media") on November 24, 2005. Destiny cites no precedent to support its assertion. First, as Destiny admits, its agreement to acquire the Station and its assets from Max Media excludes any right to any claims relating to NBC's Affiliation Agreement from the transaction, which is both notable and, in this case, conclusive. ² Second, Destiny's filing should be time-barred as a prudential

¹ This filing is timely submitted pursuant to Section 1.45 of the Commission's Rules. NBC Universal, Inc., the successor in interest to National Broadcasting Company, Inc. and owner of the NBC Network, is, like its predecessor, owned by General Electric, Inc. No party has alleged that NBC Network has committed any violation at issue in this proceeding, as set forth by the clear text of Section 73.658(b).

² As Max Media no longer has a current interest in any station involved in the ongoing proceeding, and Destiny has agreed that any claim by Max Media relating to the affiliation agreement was not included as part of the transaction, this matter should be moot.

matter, as Destiny did not file any comment in this proceeding during the comment period established by the Commission's March 19, 2004, notice, and waited nearly four months after it consummated its acquisition of the Station to address this proceeding. Third, Destiny's pleading in no way enhances the allegations brought by Max Media. To the contrary, Destiny had (or should have had) full knowledge of the fact that NBC intended not to renew the Station's affiliation agreement. NBC had sent such notice of non-renewal in May 2004, or roughly four months prior to Destiny's filing of an application for Commission consent to acquire the Station in September 2004. NBC also expressly noted such nonrenewal notice in its May 10, 2004, filing of its reply comments in this public proceeding.³

As to other substantive matters, Destiny's reiteration of Max Media's claims and assertions do not offer any reason for the Commission to further consider this matter. Destiny contends that: 1) Sunbelt Communications Company ("Sunbelt") has violated Section 73.658(b) of the Commission's Rules by having an agreement with NBC that prohibits NBC from affiliating with any other station in the Great Falls Designated Market Area ("DMA") outside the communities of license of Sunbelt's stations; and ii) NBC has no other "objective" explanation for its decision not to renew the Station's affiliation. Neither allegation is true. Indeed, NBC has demonstrated the contrary the contrary in prior filings in this proceeding.

As to the first, NBC has rejected any assertion that it has any "contract, arrangement, or understanding, express or implied " with Sunbelt that "prevents or hinders another broadcast station located in a different community from broadcasting any program of [NBC]." See 47 C.F.R. § 73.658(b). Already in this proceeding, NBC has noted that "once Max Media's agreement with NBC expires, there is no existing agreement that precludes NBC from affiliating with any television facility assigned to Great Falls,

³ See Reply Comments of National Broadcasting Company, Inc., Opposing Declaratory Request of Max Media, LLC, at 2 (filed May 10, 2004) (the "NBC Reply Comments").

Montana.”⁴ What will prevent the Station from airing NBC programming after July 2005 is not any alleged arrangement between Sunbelt and NBC, but the fact that the Station will no longer have an affiliation agreement with NBC.

Both the record of this proceeding and subsequent matters confirm that NBC made its own independent determination not to renew the Station’s affiliation, not that Sunbelt somehow restricted NBC’s ability to distribute its programming.⁵ Moreover, John Damiano’s recent letter to Mr. Darnell Washington, dated March 11, 2005, and attached to Destiny’s Comments, offers further evidence of this point.⁶ The letter’s penultimate sentence plainly states that: “In the event that [NBC] decide[s] to affiliate elsewhere in the Great Falls DMA, we will be happy to contact you if you wish.”⁷ That statement indicates that NBC continues to have any right needed to affiliate with other stations within the Great Falls DMA (outside of the two communities to which Sunbelt’s full-power stations are licensed).

Further, to the extent Max Media has based its claim on some alleged ignorance of NBC’s decision prior to its acquisition of the Station – a claim that should be irrelevant to the FCC’s decision to uphold the fundamentally private right of NBC Network to affiliate or not at the Network’s own discretion – Destiny’s claim is even weaker than Max Media’s. As noted, NBC’s decision not to renew the Station’s affiliation agreement was (or should have been) known to Destiny when it agreed to buy the Station. The decision not to renew – including the actual notice of nonrenewal, which was sent to Max Media in May 2004 -- was

⁴ See NBC Reply Comments at 1; Comments of National Broadcasting Company, Inc., Opposing Declaratory Request of Max Media, LLC (filed April 28, 2004) (the “NBC Comments”). These comments supplement and are in addition to all prior NBC comments.

⁵ NBC Comments at 5.

⁶ By reference, this letter is hereby again submitted into the record (to the extent Destiny’s submission is ultimately barred from this proceeding.)

⁷ See Letter from John F. Damiano, Executive Vice President, Affiliate Relations, NBC Universal TV Network, to Darnell Washington, President, Destiny Communications, LLC (dated March 11, 2005).

both a public matter in this proceeding and a matter of correspondence between Max Media and NBC well prior to the September 2004 application for Commission approval to enable Destiny to acquire the Station. (In addition, NBC has reason to believe that Max Media included the May 2004 notice as an exhibit to the acquisition agreement signed by Destiny.)⁸

As to the second, NBC has multiple reasons for deciding not to renew the Station's affiliation agreement under its existing terms. Contrary to Destiny's baseless assertion otherwise, these reasons are not subject to any "objective" balancing test, but remain entirely within the discretion of NBC. Regardless, many of the bases for NBC decision should be apparent to any observer. Two leading examples are the facts of other NBC coverage in the area and NBC's past relationships with the Station's licensees. Other than the Station, NBC currently has two affiliates assigned to communities with the Great Falls DMA and an affiliation with a third station whose projected service contour encompasses Great Falls. Accordingly, the Station is no longer necessary to serve the market (and is consistent with other network coverage of the Great Falls and a neighboring market).⁹ In addition, at the time NBC decided not to renew the Station's affiliation agreement, the owner of the Station had no other NBC affiliates, with the attendant relationship concerns resulting from such a singleton arrangement.¹⁰ (That the Station has subsequently passed through multiple owners confirms NBC's concerns regarding the stability of the Station.)¹¹

Finally, the relief apparently sought by Destiny – that the Commission force NBC to renew an affiliation agreement with the Station – is not consistent with the First Amendment or within Commission

⁸ See *id.*

⁹ See *RCA Corp.*, 60 RR 2d 563 (1986) (holding that nonaffiliation did not violate Rule because NBC pledged that there was no agreement that precluded affiliation with the relevant station and that NBC had substantial other reasons, including substantial coverage of the relevant area, not to affiliate with the relevant station); NBC Reply Comments at 1-2.

¹⁰ See *Letter to Eugene F. Mullin*, 10 FCC Rcd 4416, 4417 (MMB 1995).

¹¹ See NBC Comments at 9.

authority. The Commission has agreed, stating that the Rule is not intended "to guarantee a station the right to carry network programming." ¹² As a matter of Commission long-standing policy (and constitutional obligations), "[n]etworks have no obligation to affiliate with a particular station." ¹³ Accordingly, the Rule is "intended simply to assure the . . . network is not deprived of the right to sell to any station in a separate . . . community . . . by virtue of a contract or understanding with any station." ¹⁴ In other words, the Rule was meant "to free the producer/distributor from contractual restraints rather than to impose any new sale or distribution obligation." ¹⁵ The NBC Network requires no such Commission intervention here.

CONCLUSION

Accordingly, the Declaratory Request should be promptly dismissed or denied.

Respectfully Submitted,

NBC UNIVERSAL, INC.



F. William LeBeau

1299 Pennsylvania Avenue, NW
11th Floor
Washington, DC 20004
202-637-4535

Its Senior Regulatory Counsel and Assistant Secretary

April 5, 2005

¹² See *Mullin*, 10 FCC Rcd at 4417.

¹³ See *id.*

¹⁴ *Letter to The Helen Broadcasting Company Limited Partnership*, 5 FCC Rcd 2829 (1990).

¹⁵ *Id.*

CERTIFICATE OF SERVICE

I, Martha A. Shiles, do hereby certify that on this 5th day of April, 2005, copies of the foregoing Consolidated Opposition to Motion to Accept Comments and to Comments of Destiny Licenses, LLC in Support of Petition for Expedited Declaratory Ruling were served by prepaid, first-class mail on:

Thomas J. Hutton, Esq.
Uhlmann/Latshaw Broadcasting LLC
5823 Potomac Avenue, N.W.
Washington, DC 20016-2517

Kevin F. Reed, Esq.
Kevin P. Latek, Esq.
Dow, Lohnes & Albertson, PLLC
2300 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036-6802

Julian L. Shepard, Esq.
William Mullen, Esq.
A Professional Corporation
1666 K Street, NW
Suite 1200
Washington, DC 20006-1200

Alan C. Campbell, Esq.
Jason S. Roberts, Esq.
Irwin Campbell & Tannenwald, PC
1730 Rhode Island Avenue, NW
Suite 200
Washington, DC 20036

J. Dominic Monahan, Esq.
Ulvass, Cobb, Richards & Fraser, PC
777 High Street
Suite 300
PO Box 10747
Eugene, OR 97440-2747

Erwin G. Krasnow, Esq.
Garvey Schubert Barer
1000 Potomac Street, NW
5th Floor
Washington, DC 20007


Martha A. Shiles